Supreme Court, U.S.
FILED

10-3 MAY 18 2010

No. OFFICE OF THE CLERK

In the Supreme Court of the United States

Edward H. Flint

Petitioner

v.

Target Corporation

Respondent

On Petition for a Writ of Certiorari to the Court of Appeals for the Sixth Court

PETITION FOR A WRIT OF CERTIORARI

EDWARD H. FLINT PRO, SE
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QUESTIONS PRESENTED

1- Is KRS411.340 unconstitutional on its face?

2- Is KRS 411.340 unconstitutional when applied to prescription drugs, ordered by a Doctor?

3- Does KRS 411.340 pertain to Prescription drugs dispensed by a pharmacy?

4- Can KRS 411.340 relieve a pharmacy from the responsibility of supplying FDA approve prescriptions drugs to their customer?

5- Was Petitioner denied his due process when the trial court ignored the facts that Target had the responsibility to notified Petitioner that the drugs that injured him was manufacturer by a different company than the first two fills that did not injured him

6- Was Petitioner denied due process when the trial Court refused to grant Petitioner leave to submit an amended complaint adding new allegations, adding the Manufacturer and Distributor of the pills that injured Petitioner in?

7- Was Petitioner denied due process when the trial court ignored the facts that documents produced by Respondent, and given to Petitioner with the drugs that injured him, did not show the possibly of the injury Petitioner received. The documents listed side effects as headaches and belly pain and Petitioner received hives.

In the Supreme Court of the United States

NO._____

Edward H. Flint, Petitioner,

v.

Target Corporation, Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

Edward H. Flint the Petitioner prays, that a Writ of Certiorari issue to review the judgment of the Sixth Circuit Court case No. 09-5153 entered in the above case on January 21, 2010

OPINION BELOW

The judgment of the Sixth Circuit entered on January 21, 2010

JURISDICTION

The jurisdiction of the Supreme Court is invoked under 28 USC 1254

Parties

EDWARD H. FLINT, Petitioner

Target Corporation Respondent

TABLE OF CONTENTS

Table of cases iv

STATUTE INVOLVED 1

STATEMENT OF THE CASE 1

REASON FOR GRANTING THE WRIT 6

CONCLUSION 9

APPENDIX

1- Sixth Circuit Case 09-5152 Order A1
denying a rehearing entered April 14, 2010

2- Sixth Circuit Case 09-5153 opinion A2
Affirming District Court, entered January 21, 2010

3- District Court Memorandum opinion A8
regarding summary Judgement dated January 13, 2009

4- Judge's order granting summary A19
judgement dated January 13, 2009

5- Judges order dated September 30, 2008..... A20

6- Order quashing a subpoenaed deposition..... A22
dated July 23, 2008

7- Judges order dated July 3, 2008..... A23
8- Memorandum opinion and order A25
dated June 11, 2008

9- Judges order dated June 10, 2008..... A30

10- Scheduling Order dated..... A33
January 9, 2009

11- KRS 411.340..... A36

12- Petitioner's motion filed with the A37
trial court on August 27, 2008 asking for leave to amend the original complaint, which was denied.

STATUTE INVOLVED

Kentucky Statute- KRS. 411.340., see Appendix A.

STATEMENT OF THE CASE

Procedural history

This action arises out of a complaint filed on in Jefferson County Kentucky Circuit Court on October 10, 2007 case No. 07-CI-09987. Petitioner was Pro, Se and was 77 years old. Respondent on October 30, 2007 had the case removed to Western District Court of Kentucky, case No. 3:07CV-600R. Respondent was granted Summary Judgment on January 13, 2009. Petitioner appealed the case to the Sixth Circuit Court on January 19, 2009. The Sixth Circuit Court on January 21, 2010 affirmed the district court ruling. Petitioner on January 27, 2010 filed a motion for a rehearing and on April 14, 2010 the appeals court denied the rehearing.

Relevant facts of the case

1- Petitioner Flint was operated on for prostrate cancer in November of 2006 at the age of 76. When he was discharged his Doctor gave him a prescription for Pyridium a drug to keep down potential infection. The prescription had three fills for the drug. Petitioner took the prescription to Target, and ordered the first fill. When the first fill ran out Petitioner ordered the second fill, neither fill gave him any injury.

2- When the second fill ran out Petitioner ordered the last fill. The last pills Petitioner received was from a different supplier.

3- After Petitioner took three days supply of the amount the Doctor prescribed of the last fill Flint broke out with hives in his mouth, tongue, and groin area. Flint's doctor told him to quit taking the pills and see his family doctor. Flint's family doctor sent him to a specialist, who confirmed he had hives.

4- Petitioner from the injury of the last pills has lost his taste, along with having hot flashes, he can't sleep on his right side of his body, he has dry mouth and chapped lips constantly, his groin area has to be cleaned and treated with ointment two to three times per day.

5- Flint discovered that the last pills dispensed to him from the new supplier were never approved by the FDA.

6- Petitioner discovered that the last pills each weight two hundred and thirty percent (230%) more than each of the pills he received in the first two fills.

7- Petitioner also discovered that there were ten (10) different in-active Ingredients in the last fill pills that were not in the first and second fill pills. The in-active ingredients were chemicals which can be as harmful as the active ingredients.

8- The trial court quit ruling on Flint's motions after June 13, 2008 and left forty- seven motions that was never ruled on.

9- With the last fill Petitioner was given a sheet that was a "Patient Education" page. The sheet is a document that Target gives to customers when filling prescriptions.

17- On June 13, 2008, three (3) days later Petitioner resubmitted his motion with a copy of the proposed amended complaint.

18- The trial Court refused to rule either way on Petitioners amended complaint motion.

19- In that complaint was were new allegations that Respondent alone was responsible for and wouldn't fall under KRS 411.340 under any reading of the statute.

20- When the case first started the trial judge issued on January 4, 2008 a scheduling order under Fed.R.Civ.P. 26. Discovery was to be completed by July 28, 2008. The trial Court never ruled on any motion regarding discovery after the June 10, 2008 order that was issued.

21- Respondent filed a motion for summary judgment on May 23, 2008.

22- Petitioner filed a motion for summary judgment on July 28, 2008 and the trial court never ruled on this motion.

23- On August 14, 2008 Respondent filed a motion requesting the remand of their motion for a summary judgment that had been filed on May 23, 2008 and the court on September 30, 2008 granted the motion.

24- August 27, 2008 over four months before Summary Judgment was granted to Target on January 13, 2008 by the trial court, Petitioner on filed the following motion **"Plaintiff moves this court, to grant Plaintiff leave to amend the original complaint with the attached complaint which also joins two (2)other)**

The Patient Education page stated and I quote" **POSSIBLE SIDE EFFECTS: SIDE EFFECTS that may go away during treatment include headache, stomach upset or cramps, if they continue or are bothersome, check with you doctor"**. Again it said nothing about hives.

10- In addition Petitioner also received a printed card called **PATIENT INFO CARD** with the last fill of the pills and that card stated **"side effects could be Headaches and Belly Pain.** A customer should be able to rely on information that comes with their medicine.

11- Neither the Patient Education sheet nor the Patient Card given Petitioner notified Petitioner that the pills would cause hives, which they did.

12-Neither the manufacture or distributor of the pills had anything to do with the wording in the patient Education Sheet or Patient Card.

13- Target designed and printed the information sheets to inform their customers about what side effects to expect.

14- Target had the direct responsibility to give Petitioner the right instructions. Why would a customer expect hives if the Card and sheet didn't say so?

15- Petitioner filed a motion with the trial court to amend his original complaint in May 2008. The amended complaint contained many new allegations.

16- The trial court issued an order dated June 10, 2008 denying the motion, because Petitioner forgot to attach a copy of the proposed amendment to the motion. However the court's order stated Petitioner could resubmit the motion with the proposed amended copy attached.

Defendants and if this motion is granted then Plaintiff asks for leave to remand the motion he filed on June 13, 2008 on which this court has not rule."

This new motion added new allegations plus added the Manufacturer and Distributor of the pills that injured Flint, to the original complaint. Petitioner never received a ruling of any type on this motion from the trial court.

25-Petitioner also on the same day, August 27, 2008 filed another motion, asking for the following,"**for leave to join two other parties into this case as Defendants. And conspirators"** Petitioner was never granted leave nor received an answer of any type from the trial court on either of these two motions.

26-The trial court in its summary judgment opinion order stated and I quote, "what is the specific duty of care owned by pharmacists to their customers" The court then made the case that pharmacists are to dispense the correct medication in accordance with the prescribing physician's instructions. However there is more to pharmacist's duties than just that dispensing the correct drug. Target has a policy to notified customers when they dispense pills that is from a different supplier.

27- Target testified they had a policy on changing suppliers. The exact language they testified was and I quote,

"Target notifies quests of the change by placing a green sticker on the bottle that states "This is the same medication you have been getting. Color, size or shape may appear different".

28- The last fill that Petitioner received, did not have a sticker warning him that the pills were from a

different supplier.

29- The trial court refused to rule on motions to compel on two persons who were served with subpoenas for depositions. One each from the manufacture and distributor.

30- The trial Court quashed a subpoena Petitioner served on the President of Target and refused to let Petitioner take his deposition.

31- Target like most chain store pharmacies have no involvement in ordering or monitoring drugs they sell to customers. In the case of Petitioner the pills went through four hands before Flint received them.

REASONS FOR GRANTING THE WRIT

KRS 411.340:

1-KRS 411.340 is unconstitutional.

2-KRS 411.340 puts a burden pertaining to prescription drugs on the customer that is all most impossible for that person to know or discover in prescription drugs, since drugs are manufactured the world over and shipped to America. The language in KRS 411.340 put the burden of the customer rather that on the seller to sell high-quality products

3- In this case the pills and the container they came in did not meet the requirement of the statute. The statute requires the Manufacturer to be identified and subject to the jurisdiction of the court. The container the pills came in stated the manufacturer as Breckenridge, who was not the manufacture. Petitioner was mislead by the respondent

The Respondent in all discoveries, pleading, and brief stated the manufacture as Breckenridge. Until

the Respondent in it response to Petitioner Brief in the Court of Appeals stated for the first time the real Manufacturer was Contract Pharmacal Corporation.

4- Prescription drugs sold as individual fills can not meet the requirement of KRS 411.340 of being in it original condition or package when delivered to the customer. This statement eliminates prescription drugs

5- KRS 411.340 as written is broad and was meant for prepackage items or a product
standing on its own that is not packaged like a lawn mower or a car or chair rather than drugs. KRS 411.340 is unconstitutional the way it is written because it tries to take in to account ever product made or sold.

6- The only way Prescription drugs could fall in to this statute is if a drug was prepackage, sealed, printed with the words FDA approved and contained the Manufacturer name.

7-There is not question that the product in question was defective, unreasonably dangerous to the user.

8-In America today with thousands of companies making generic drugs being shipped into America from all over the world, with over half of the population being on prescription drugs (mostly elder) any Pharmacy could sell any thing to a consumer and hide behind this statute in Kentucky. A drug dealer could take a bad drug from one state and ship it to Kentucky, sell it and hide behind this law. It took Petitioner a long time to find out who the true manufacturer was, because Target told Petitioner the manufacturer was Breckenridge instead of Contract.

Another reason for granting writ

1- The trial court should have granted Petitioner leave to amend his original complaint, especially to add new allegations, to add the manufacturer of the drugs that harmed him and to add the distributor of the drugs in question. The Petitioner filed his motion for leave to amend the complaint over 4 months before the trial court granted Respondent summary judgment. What reason was there to hurry the summary judgment motion? Justice should come before anything else.

Other reasons for granting writ

1-The trial court error by granting all of Respondent's actions under KRS 411.340. Respondent actions of not warning Petitioner about changing suppliers of his drugs by putting a label on the container that contained the pills that supplier was changed, did not fall under KRS 411.340

2- Also Target was the only one responsible for the printed information on the sheet and card, which was in error. The education sheet and Patient information sheet failed to inform Petitioner the truth about what harm the drug could cause him.

3- The pills that Petitioner received was not FDA approved.

CONCLUSION

1- This court should rule on the Unconstitutional of KRS 411.340 on it face.

2- This Court should rule on the Unconstitutional of KRS 411.340 when prescription drugs are purchased.

3- The last fill of pills given to Petitioner was not FDA approved drugs.

4- Petitioner should have been allowed to amend his complaint and add the manufacturer and distributor along with all new allegations he discovered as he filed two motions to do.

5- Petitioner did not receive the due process he deserved by the constitution to a fair trial. Any fair mined judge would have allowed Petitioner sufficient time to get to the end of this case and would have treated all parties equal.

6- As shown above the summary judgment of the Trial Court was in error and the Appeal Court was in error and must be reversed.

7-This Court should grant certiorari and remand the case back to the trial court with instructions to grant leave to Petitioner on amending his complaint.

8-The trial court should rule on all motions that were not ruled on and the case should continue and a trial takes place.

9- KRS 411.340 fails to protect the consumers of Prescription drugs and puts a blanket over those who prey on the ill and elderly and those who put trust in our government.

10- Respondent should not been granted summary judgment on the issues that Target was answerable for, issues that the manufacturer and distributor had no connection to.

11- Every person deserves a fair and complete trial and it's impossible for the court to set a firm trial dated at the beginning of a case and not allow additional time when needed. Unless the court's mind is made up at the beginning.

12- The elderly of this country needs this issue ruled on by this court in order they will know what to except from the drug industry as they purchase prescription drugs.

13- This Petition is not the best worded, but it's the best a 80 year old man who is not trained in law and who does his own typing with one finger can do and he prays it is worded good enough to put his point across to this honorable body

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 09-5152

Edward H. Flint, Plaintiff-Appellant,

v.

Target Corporation, Defendant-Appellee.

On Appeal from the United States District Court for the Western District of Kentcky

FILED - April 14, 2010

Before: Merritt, Moore, and Gibbons, Circuit Judges.

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, he petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied

Entered by Order of the Court

(s) Leonard Green
Leonard Green, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

File Name: 10a0037n.06
No.09-5153

Edward H. Flint, Plaintiff-Appellant,
v.
Target Corporation, Defendant-Appellee.

On Appeal from the United States District Court for the Western District of Kentcky

FILED - January 21, 2010

Before: Merritt, Moore, and Gibbons, Circuit Judges.

Julia Smith Gibbons, Circuit Judge. Edward H. Flint appeals the district court's grant of summary judgment for defendant Target Corporation ("Target"). Flint sued Target *pro se* on theories of negligence and product liability for the adverse physiological reactions he suffered allegedly as a result of taking

[1] Ky. Rev. Stat. Ann. § 411.340 provides:
In any product liability action, if the manufacturer is identified and subject to the jurisdiction of the court, a wholesaler, distributor, or retailer who distributes or sells a product, upon his showing by a preponderance of the evidence that said product was sold by him in its original manufactured condition or package, or in the same condition such product was in when received by said wholesaler, distributor or retailer, shall not be liable to the plaintiff for damages arising solely from the distribution or sale of such product, unless such wholesaler, distributor or retailer, breached an express warranty or knew or should have known at the time of distribution or sale of such product that the product was in a defective condition, unreasonably dangerous to the user or consumer.

prescription medications dispensed by his local Target pharmacy. The district court held that no genuine issue of material fact existed that could allow Flint to establish that Target breached the duty it owed him as a pharmacist and granted summary judgment on his negligence claim. Further, the district court found that Kentucky's "middleman" statute, Ky.Rev.Stat. Ann. § 411.340, applied to Target to shield it from liability on Flint's product liability claim/ For the reasons that follow, we AFFIRM the judgment of the district court.

In November 2006, Flint's surgeon issued him a prescription for Pyridium (generic name: phenazopyridine). Flint filled the prescription and refilled it twice at the same Target pharmacy, which provided him a generic form of the drug each time. The company that manufactured the pills dispensed in the second refill, Contract Pharmacal for Breckenridge Pharmaceutical, was not the same company that had manufactured the pills in the first two fills. Each prescription fill was accompanied by a patient information sheet, which listed various contraindications, side effects, and possible indicia of an allergic or negative physiological reaction. Flint experienced no adverse effects from the first two fills, but shortly after taking pills from the third fill, Flint experienced what he believed to be an allergic reaction—itchy hives and bumps inside his mouth, a numb tongue, and a loss of taste. When Flint reported the reaction to the Target pharmacy, the pharmacy manager determined that there had been no error in the filling of the prescription, referred Flint to Target's national customer service, and gave Flint a refund, the names and numbers of the manufacturers of the pills, and a list of the inactive ingredients in the pills dispensed in the third fill.

Flint attempted to resolve his concerns directly with Target's customer service department, but when Target did not help Flint to his liking, he filed the present suit on October 10, 2007. The suit was originally filed in Jefferson Circuit Court, but was promptly removed to federal court on October 30. Target moved for summary judgment on August 14, 2008, and the district court granted the motion on January 13, 2009. *Flint v. Target Corp.*, No. 3:07CV-00600-R, 2009 WL 87469 (W.D. Ky. Jan 13, 2009). Flint timely appealed.

We review *de novo* a district court's grant of summary judgment. *Williams v. Mehra*, 186 F.3d 685, 689 (6th Cir. 1999) (*en banc*). Summary judgment is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court must review all the evidence, facts, and inferences in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). In order to defeat a summary judgment motion, the nonmoving party "must show sufficient evidence to create a genuine issue of material fact." *Prebilich-Holland v. Gaylord Entm't Co.*, 297 F. 3d 438, 442 (6th Cir. 2002). Entry of summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

Flint argues that the district court erred in granting Target summary judgment. We find the district court's reasoning and conclusions to be correct. On Flint's negligence claim, under Kentucky law,

pharmacists owe their customers the duty of care used by ordinarily skillful and prudent pharmacists under similar circumstances—in this case, to dispense the correct medication in accordance with the prescribing physician's instructions. *See Ohio County Drug Co. v. Howard*, 256 S.W. 705, 707 (Ky. 1923). As the district court found, all evidence presented indicates Target complied with that standard. *Flint*, 2009 WL 87469, at *3. Flint claims that the drugs he was given were not FDA-approved, but these statements are no more than bare allegations and do not suffice to defeat summary judgment. He also contends that Target breached its duty to him in the third fill by substituting a cheaper generic drug for another generic, but Target's actions are actually authorized by Kentucky statute, *See* Ky. Rev. Stat. Ann. § 217.822. Flint further claims that Target had the duty to investigate and test any prescription medications it sold before dispensing them to customers, but there is no law to support this assertion. Summary judgment on Flint's negligence claim based on the element of breach was appropriate.

On Flint's product liability claims, the district found that pharmacists in Kentucky are protected by the state's "middleman statute."[1] Kentucky law provides that retailers are not liable in product liability actions if: "(1) the manufacturer [is] identified and subject to the Court's jurisdiction, and (2) the product sold by the . . . retailer [was] unaltered from its original manufactured condition." *Salisbury v. Purdue Pharma, L.P.*, 166 F. Supp. 2d 546, 551 (E.D. Ky. 2001). Exceptions to middleman protection exist if: (1) . . . the . . . retailer breached an express warranty, or (2) . . . the . . . retailer knew or should have known at the time of distribution or sale that the product was in a defective condition and unreasonably dangerous."

id. The district court found that the two conditions were satisfied and neither exception existed, *Flint*, 2009 WL 87469, at *3-4, and we agree. Flint raises no arguments on appeal that contradict any of these conclusions, aside from an unsupported allegation that the middleman statute is unconstitutional.

Flint also argues that the district court should have ruled on various nondispositive motions before granting summary judgment, including motions to compel discovery and to subpoena various witnesses for depositions. The district court, however, found that "[n]one of the discovery sought in the remanded motions would have materially affected this Court's determination" on summary judgment. *Id.* at *5. We agree, and affirm the district court on this ground as well.

Finally, Flint argues that the district court erred by not allowing him to amend his complaint. We review a district court's denial of a plaintiff's motion for leave to amend his complaint for abuse of discretion. *Evans v. Pearson Enters., Inc.*, 434 F.3d 839, 853 (6th Cir. 2006). However, "[w]hen the district court refuses the plaintiff's request for leave to amend her complaint on grounds of futility, this court reviews de novo because the decision is based on a legal conclusion." *Id.* (citing *Yuhasz v. Brush Wellman, Inc.*, 341 F.3d 559, 569 (6th Cir. 2003)). Flint filed separate motions for leave to amend in the district court. In the first motion, filed June 16, 2008, Flint sought to add greater detail to his complaint to supplement his claims against Target. In its summary judgment opinion, the district court held: "That motion has not been granted and, although it contains additional narrative, the tendered Amended Complaint does not contain additional causes of action, nor would it change the Court's substantive analysis."

Flint, 2009 WL 87469, at *2 n.3. Because this is a holding that the amendment would have been futile, we review *de novo*. Upon examining the proposed amendments, however, we agree with the district court that the added details Flint provides would not help him establish a genuine issue of material fact on the issues that entitle Target to summary judgment.

Flint's motion for leave to amend his complaint, filed August 28, 2008, sought to add two additional defendants, Breckenridge Pharmaceutical and Contract Pharmacal. The district court did not rule on this motion it its summary judgment decision. However, the district court docket reveals that all non-dispositive motions were referred to a magistrate judge on May 20, 2008, who, on September 30, 2008, ordered that "all pending non-dispositive motions are hereby administratively remanded without prejudice to the parties' right to request that they be returned to the court's active docket within 15 days after entry of any order denying Target's request for summary judgment." Flint had been advised that, in order to have any of his remaining motions decided, he needed to take action before the district court, which he never did. He did not appeal the magistrate's order, nor did he include the order, this motion to amend, or any other motions in his notice of appeal.[2] Therefore, we find that Flint has not properly preserved this argument or any other argument pertaining to undecided motions for appeal.

For the reasons set forth above, we AFFIRM the district court's grant of summary judgment.

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[2] Furthermore, any further consideration of the August 28 motion to amend would be futile, as the one-year limitations period that applies to product liability and negligence claims in Kentucky had run before the motion was filed. *See* Ky. Rev. Stat. Ann § 413.140.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 3:07CV-00600-R
No.09-5153

Edward H. Flint, Plaintiff-Appellant,
v.
Target Corporation, Defendant-Appellee.

FILED - January 13, 2009

MEMORANDUM OPINION

In this action, the plaintiff, Mr. Edward H. Flint, is suingTarget Corporation *pro se*[1] because he experienced a negative physiological reaction after taking some medication dispensed by his localTarget pharmacy. Mr. Flint believes that the negative reaction was directly caused by some pills dispensed by theTarget pharmacy, and suspects the pills contained one or more harmful ingredients. In response,Target asserts that it correctly filled and dispensed Mr. Flint's prescription in accordance with his doctor's directions, and that there exists no evidence either that: (a) Mr. Flint's alleged reaction was caused by the pills in question, or (2) that the pills dispensed improperly

[1] *Pro se* is a Latin adjective "for self," and a short convenient phrase courts use to describe a person who represents himself in a legal proceeding without the aid of an attorney.

contained harmful ingredients. Accordingly, Target has filed a motion for summary judgment of Mr. Flint's claims.

The Court has reviewed Target's motion, Mr. Flint's response thereto, and the evidence of record in this case. While the Court is not without sympathy to Mr. Flint's past physical discomfort, or his frustration over what he believes to be poor customer service taken to a potentially harmful extreme,[2] it observes that any recovery to be had would come from the manufacturer or distributor of the pills, not Target.

In Kentucky, there are two possible theories of recovery against pharmacists who dispense allegedly harmful medication: negligence and product liability. In this matter, there exists no genuine issue of material fact that would permit plaintiff to proceed to trial against Target on either claim. Accordingly, for the reasons stated herein, the Court will grant Target's motion for summary judgment and dismiss this action.

I.

The facts about which the parties agree or, where disagreements exist, viewed in the light most favorable to Mr. Flint, are as follows. In November 2006, Mr. Flint's surgeon issued Mr. Flint a prescription of Pyridium (generic name: phenazopyridine) following

[2]In making this observation, the Court does not mean to imply that it is this Court's official opinion that Target did, in fact, demonstrate poor customer service, much less that it is this Court's official opinion that Target made decisions that put the health or safety of its customers at risk. Rather, the Court is simply observing that Mr. Flint clearly, and earnestly, believes that Target did. As with much of life, there are the rare extremes of indisputable fact on one side and unfounded perception on the other, and then there is the large middle ground in between that consists of varying combinations of the two, neither of which can be dismissed without appropriate consideration and explanation when reaching a judgment.

surgery on Mr. Flint's prostate gland. Pyridium is an analgesic used to relieve symptoms of urinary tract discomfort. Mr. Flint took the prescription, which called for an initial supply and two refills, to his local Target pharmacy to be filled. The first supply of the drug was dispensed on November 16, 2006, in its generic form. The first refill, also in generic form, was dispensed by the same Target pharmacy on November 24, 2006. The second refill, also in generic form, but manufactured by a different company, was dispensed on December 6, 2006, again by the same Target pharmacy. Each time the prescription was dispensed, it was accompanied by a patient information sheet which listed several possible contraindications, side effects (including headache, mild itching, and stomach cramps), and possible indicia of an allergic or negative physiological reaction (specifically blue or purple skin color, decreased urination, vomiting, yellow skin or eyes, rash, itching, swelling, dizziness, or trouble breathing).

On December 11, 2006, Mr. Flint reported to the pharmacy manager, Mr. Robert Wolford, that he had experienced what he believed to be an allergic reaction to the pills contained in the second refill—itchy hives and bumps inside his mouth, a numb tongue, and a loss of taste. Mr. Wolford examined the prescription and determined that there had been no error in the *filling* of the prescription. In other words, Mr. Wolford confirmed that the drug Pyridium had been dispensed to Mr. Flint (albeit in its generic form, phenazopyridine) and the dosing instructions had been issued in accordance with Mr. Flint's surgeon's instructions. Mr. Wolford instructed Mr. Flint to stop taking the medication, however, and told him to call his surgeon. Mr. Wolford also gave Mr. Flint Target's national customer service number and the names of, and contact information

regarding, the two companies who had manufactured the pills dispensed to Mr. Flint. Lastly, Mr. Wolford refunded Mr. Flint's money and gave Mr. Flint a list of the inactive ingredients in the pills sold by Breckinridge Pharmaceutical, the company that had manufactured the pills in the second refill, which contained the pills Mr. Flint was taking when he experienced a negative physiological reaction.

Thereafter, Mr. Flint attempted to resolve his concerns directly with Target's customer service department. The experience was not to Mr. Flint's liking. He perceived that Target's customer service agents were not being appropriately responsive to his concerns and were not being sufficiently helpful to his efforts to determine the cause of his reaction. Correctly or incorrectly, this led Mr. Flint to his now firmly-held belief that Target places greater emphasis on profit than customer health and, therefore, does not employ appropriate internal control measures sufficient to ensure that it only purchases quality pharmaceutical supplied from the manufacturers and distributors with whom it does business. He believes that there was some unidentified allergenic or otherwise harmful ingredient in the pills manufactured by Breckinridge Pharmaceutical that caused him to have an allergic reaction, not properly described as a risk on the patient information handouts provided to him when his prescription was dispensed. Hence this lawsuit.

Because Mr. Flint is proceeding without an attorney, his causes of action are not presented in the customary fashion. That is to say, his specific legal claims are not identified and isolated from his general allegations. Rather, Mr. Flint's Complaint is presented in narrative form, as a series of complaints. This is not impermissible, or even atypical of Complaints filed

pro se, but it nevertheless does pose some difficulty for the Court and for opposing counsel, who must attempt to liberally construe Mr. Flint's narrative and discern discrete, actionable claims amongst the general prose.

In its motion for summary judgment, Target has construed the Complaint as seeking relief under the theories of negligence and product liability. This comports with the Court's reading of the Complaint,[3] and its understanding of potential theories of recovery available to Mr. Flint under Kentucky law. Accordingly, the Court will now evaluate each cause of action, and determine whether Target's request for summary judgment should be granted or denied.

II.

It should be well known to all in the legal community by now, but because Mr. Flint is acting as his own counsel, it bears repeating that summary judgment as a matter of law is proper only where there exists no *genuine* issue of *material* fact. FED. R. CIV. P. 56(c)(emphasis added). In considering a motion for summary judgment, this court must construe the evidence and draw all reasonable inferences in favor of the non-moving party (in this case, Mr. Flint), *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986), and determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 91986).

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[3]Mr. Flint filed his initial Complaint in Jefferson Circuit Court on October 10, 2007, and it was removed to federal court on October 30. On June 16, 2008, after Target had moved for summary judgment, he filed a motion requesting leave to file an amended complaint. That motion has not been granted and, although it contains additional narrative, the tendered Amended Complaint does not contain additional causes of action, nor would it change this Court's substantive analysis.

The party bearing the burden of proof on a particular issue – regardless of whether he is the movant or non-movant – cannot rely on mere allegations or conclusory statements, however. *See Maki v. Laako*, 88 F.3d 361, 364 (1996). Whereas a *pro se* Complaint will be liberally construed and may be presented in narrative form, proof of a *pro se* plaintiff's allegations is a different matter. To defeat Target's motion for summary judgment, Mr. Flint must point to in the record, or proffer, actual evidence. *Id.* What's more, the evidence he proffers must fit within certain parameters. It must be "of an evidentiary quality [*i.e*, capable of being admitted at any trial of the matter] that demonstrates the existence of a genuine issue of material fact." *Bailey v. Floyd County Bd. of Educ.*, 106 F.3d 135, 145 (6th Cir. 1997)(emphasis and bracketed explanation added. To be of evidentiary quality, "[t] he proffered evidence need not be in admissible form, but its content must be admissible." *Id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)(emphasis in original omitted)).

With that general explanation in mind, the Court will turn to Mr. Flint's claims.

A. Negligence

Mr. Flint asserts that Target was negligent in its dispensing of his second refill. To successfully prosecute a claim of negligence, a plaintiff must establish the following four elements of that claim, that the Court will describe in terms particular to Mr. Flint's allegations:

1. That Target owed Mr. Flint a duty of care,
2. That Target breached that duty,
3. That Mr. Flint suffered injury, and
4. That the injury he allegedly suffered was

directly or proximately caused by Target's breach of its duty of care.

See, e.g., Mullins v. Commonwealth Life Ins. Co., 839 S.W.2d 245, 247 (Ky. 1992). This, of course, begs the question: What is the specific duty of care owed by pharmacists to their customers? In Kentucky, the care owed is the duty of care used by ordinarily skillful and prudent pharmacists under similar circumstances – that is, to dispense the correct medication in accordance with the prescribing physician's instructions. *See Ohio County Drug Co. v. Howard*, 256 S.W. 705 (Ky. 1923)(older, but still good, common law). All of the evidence presented, even when construed in the light most favorable to Mr. Flint, indicates that Target did just that. Moreover, not even Mr. Flint disputes that Target dispensed phenazopyridine (Pyridium) pills in the correct dosage with the correct instructions for their use. Accordingly, putting aside the question of whether Mr. Flint proffered sufficient evidence that the physiological reaction he experienced was caused by the phenazopyridine pills he purchased at Target,[4] and not a reaction to a food or another type of medication he was taking, or even a reaction to another substance in his home or work environments, he cannot establish a key element of his negligence claim, namely that Target breached the duty of care it owed him when filling and re-filling his prescription. Target is therefore entitled to summary judgment of this claim.

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[4]The evidence proffered indicates that Dr. Kuhn, Mr. Flint's physician and expert witness, testified that he cannot be certain that phenazopyridine caused Mr. Flint's reaction. He further testified that he recommended that Mr. Flint consult with another specialists, Dr. Fowler, who might be able to isolate the cause of Mr. Flint's allergic reaction. There is no evidence that Mr. Flint ever sought Dr. Fowler's assistance, or consulted with any other specialist capable of opining with a reasonable degree of certainty about the cause of Mr. Flint's symptoms.

B. Product Liability

The more complicated question is whether Mr. Flint has alleged a viable product liability claim against Target. Mr. Flint believes that the pills contained in his second refill, *i.e.* those manufactured by Breckinridge Pharamaceutical, may contain one or more inactive ingredients that are either inherently harmful or capable of causing allergic reactions such as the ones he allegedly experienced. In other words, he is asserting that Target sold him a defective product.

Generally speaking, anyone in the stream of commerce – from the manufacturer, to the distributor, to wholesaler, so the retailer – is *potentially* strictly liable for damages caused by a defective product. There are limits, however. As a matter of Kentucky statutory law, if the manufacturer of a defective product is identified and subject to the jurisdiction of the court, then the "middlemen" – namely those in the stream of commerce between the person who made the product and the ultimate consumer – such as distributors and retailers – are not potentially liable for harm caused by the allegedly dangerous product *unless* the product was altered from its original manufactured condition or packaging, *or* the "middleman" either (a) breached an express warranty or (b) "knew or should have known at the time of distribution or sale of such product that the product was in a defective condition unreasonably dangerous to the user or consumer." *See* Ky. Rev. Stat. §411.340.

The first issue, of course is whether the manufacturer of the product has been identified. It has. Target identified Breckinridge Pharmaceutical as the manufacturer of the phenazopyridine dispensed to Mr. Flint in his second refill of his prescription, and Mr. Flint has neither disputed this in his pleadings,

nor proffered evidence to the contrary. The next issue is whether Breckinridge is subject to the jurisdiction of this Court. It is, because it contracted to supply phenazopyridine to Target pharmacies in the Commonwealth. *See* Ky. Rev. Stat. 454.210; *see also Intera Corp. v. Henderson III*, 428 F.3d 605, 615 (6th Cir. 2005)(discussing the circumstances under which a company may be subject to the jurisdiction of this Court). The Court is thus left to ponder whether there is admissible evidence indicating that the pills sold to Mr. Flint had been altered from their original condition by Target, whether Mr. Flint alleged (in layman's terms) that Target breached an express warranty to him, or whether there is admissible evidence indicating Target knew the pills it supplied him were in a defective, unreasonably dangerous condition. If the Court answers "yes" to any of those three questions, Target may be liable to Mr. Flint.

With respect to the first question, this Court is not of the opinion that Kentucky courts would determine that a pharmacy's mere act of dividing and distributing drugs in doses is not sufficient to constitute an alteration of the drug's original condition or package. *See Smith v. Wyeth Inc.* 488 F. Supp, 2d 625, 629 (W.D. Ky. 2007)(Russell, J.). Something more, some active adulteration, is required. There is no allegation, much less any evidence, thatTarget deliberately adulterated the drugs from Breckenridge, or otherwise mis-handled them in a manner capable of causing harm to a consumer. Rather, Mr. Flint's allegation is that Target's fault stems from its decision to purchase the drugs from Breckenridge. That is a different issue altogether, and will be addressed next.

This Court finds, that, as a matter of law, Kentucky courts would agree with the majority of states

which held that pharmacists are not liable for breach of either express or implied warranties with respect to the properties of particular drugs. *See id*, 488 F. Supp. 2d at 629 (internal citations omitted). Thus, even if Mr. Flint's allegations could be liberally construed to include a claim for a breach of an express warranty with respect to the properties of the medicines it dispenses,[5] that claim would fail.

As for the third and last question, there simply is no evidence that the pills supplied by Breckenridge were in a defective, unreasonably dangerous condition. Rather, the evidence presented indicates that they fell within manufacturing specifications. There is no evidence to suggest that they had been altered, tampered with, or subjected to conditions that would have affected their chemical composition (*e.g.*, water, reactive chemicals), even from the testing facility to which Mr. Flint sent samples. Mr. Flint suspects that Breckenridge's generic form of Pyridium may have contained an inactive ingredient that was harmful to him in the sense that it triggered an uncomfortable, and lasting allergic reaction that has affected his quality of life. He may indeed be correct, but he has not responded to Target's request for summary judgment by providing the Court with the requisite evidence to prove that it did, however, and even if Mr. Flint could identify the putative allergen contained within the Breckenridge, that does not – without more

[5]This is the Court's best reading of Mr. Flint's allegations. As noted previously, Mr. Flint believes that Target is not engaging in appropriate quality control in several areas ranging from its customer service, to its selection of suppliers, to its monitoring of the composition of the drugs it dispenses. One way of looking at this complaint (little "c") is that it constitutes a breach of some duty of allegations is that they state a claim for breach of warranty that any medicines sold would not contain any unidentified allergenic or otherwise harmful ingredients.

specific proof – establish that the pills in question were defective or unreasonably dangerous. Target is therefore entitled to summary judgment in its favor with respect to Mr. Flint's second claim.

III.

In reaching its decision, the Court is mindful that, while Mr. Flint may not have a cognizable claim against Target, he nevertheless has experienced a physiological reaction that has caused him sufficient discomfort to make him initiate and vigorously maintain a lengthy lawsuit that has drained time, energy and resources. The Court is also mindful that several pending discovery motions recently were remanded pending the Court's adjudication of Target's Motion for Summary Judgment. Mr. Flint will therefore likely feel that this Court's determinations are premature, and that he has been deprived of the opportunity to uncover sufficient evidence to make his case. None of the discovery sought in the remanded motions would have materially affected this Court's determination, however. Not all injuries are capable of redress by the courts, even if plaintiffs were permitted unlimited time and access to potential sources of proof. This is not always easy for a lay person to understand. Courts are supposed to right wrongs and they do, but only when and to the extent the law permits.

The Court will enter an order concurrently with this Memorandum Opinion that grants Target's Motion for Summary Judgment and dismisses Mr. Flint's claims.

(s) Thomas B. Russell
Chief Judge, U.S. District Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 3:07CV-00600-R

Edward H. Flint, Plaintiff-Appellant,

v.

Target Corporation, Defendant-Appellee.

ORDERED - January 13, 2009

ORDER

For the reasons set forth in the Court's Memorandum Opinion entered concurrently with this Order,

IT IS HEREBY ORDERED that Defendant's Motion for Summary Judgment is **GRANTED** and Plaintiff's claims and this action are hereby **DISMISSED**.

this is a final and appealable judgment

The Court will enter an order concurrently with this Memorandum Opinion that grants Target's Motion for Summary Judgment and dismisses Mr. Flint's claims.

(s) Thomas B. Russell
Chief Judge, U.S. District Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 3:07CV-00600-R

Edward H. Flint, Plaintiff-Appellant,

v.

Target Corporation, Defendant-Appellee.

ORDERED - September 30, 2008

ORDER

Target Corporation has filed a motion for leave to remand its original motion for summary judgment and to file a revised motion. Having considered the request, and the plaintiff's response thereto, IT IS HEREBY ORDERED that the motion be granted, and the motion tendered August 14, 2008, be accepted as timely filed. Plaintiff has already filed a response to the tendered revised motion (*see* docket 151) and a more lengthy response to the original motion (*see* docket no 55). If plaintiff so chooses, the court will review both responses and deem them one joint response when considering the revised motion for summary judgment. If plaintiff would prefer, he may chooses submit yet another response, but must do so within 10 business days of the date of entry of this order. Defendant will then have 5 business days in which to file any reply.

IT IS FURTHER ORDERED that all pending discovery and pre-trial deadlines are hereby **STAYED** pending the district court's ruling on Target's pending motion for summary judgment. During that time, no

two other individuals as corporate witnesses under Rule 30(b)(6) of the Federal Rules of Civil procedure to testify to the relevant issues in this case. Accordingly, the court concludes the deposition of Mr. Steinhaffel is not permissible discovery See Fed.R.Civ.P.26(b)(2)(c)(i), (iii). The court being sufficiently advised.

IT IS HEREBY ORDERED that defendant's motion to quash is **GRANTED.**

IT IS FURTHER ORDERED that the plaintiff shall be precluded from re-noticing or attempting to take the deposition of Gregg Steinhaffel.

(s) James D. Moyer
United States Magistrate Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 3:07CV-00600-R

Edward H. Flint, Plaintiff-Appellant,

v.

Target Corporation, Defendant-Appellee.

ORDERED - July 23, 2008

ORDER

The defendant, Target Corporation, moves to quash the deposition of Gregg Steinhaffel, CEO of Target Corporation. (DN90.) The defendant has designated two other individuals as corporate witnesses under Rule 30(b)(6) of the Federal Rules of Civil procedure to testify to the relevant issues in this case. Accordingly, the court concludes the deposition of Mr. Steinhaffel is not permissible discovery See Fed.R.Civ.P.26(b)(2)(c)(i), (iii). The court being sufficiently advised.

IT IS HEREBY ORDERED that defendant's motion to quash is **GRANTED.**

IT IS FURTHER ORDERED that the plaintiff shall be precluded from re-noticing or attempting to take the deposition of Gregg Steinhaffel.

(s) James D. Moyer
United States Magistrate Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 3:07CV-00600-R

Edward H. Flint, Plaintiff-Appellant,

v.

Target Corporation, Defendant-Appellee.

ORDERED - July 3, 2008

ORDER

The undersigned magistrate judge conducted a hearing on pending discovery related matters in this case on July 1, 2008. While the court will address the multiple issues presented in that hearing in detail in later orders, the court presently orders as follows:

IT IS HEREBY ORDERED that:

1. The memorandum opinion and order of june 11, 2008, (DN 58), is hereby **VACATED**.

2. Within thirty days from the entry of this order, defendant Target shall restate its discovery responses, to reflect the new information discussed at the hearing concerning the test results of the pills in question. Target shall presently restate its discovery responses, based upon information and belief developed in its investigation of this matter. The court understands that Target may well need to further restate its responses once it has taken discovery against the pill manufacturer Breckinridge. However, to expedite the ability of all parties to proceed with discovery, Target

shall presently state its current state of knowledge is based upon investigation and information and belief, rather than personal knowledge, such a response shall be sufficient.

3. As discussed on the record, counsel for Target will coordinate with Mr. Flint (who is proceeding pro se) to take efficient discovery, whether by way of deposition or document production, against Breckinridge, the manufacturer.

Finally, the court appreciates the constructive attitude and candor of counsel and plaintiff in addressing these discovery issues.

(s) James D. Moyer
United States Magistrate Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 3:07CV-600-R

Edward H. Flint, Plaintiff-Appellant,

v.

Target Corporation, Defendant-Appellee.

DATED - June 11, 2008

MEMORANDUM OPINION AND ORDER

Mr. Flint and Target Corporation have filed what essentially are cross-motions pertaining to the same discovery. Target has filed a motion for a protective order (docket no. 36), asserting that plaintiff continues repeatedly to serve interrogatories and requests for production of documents pertaining to the information that has already been supplied. Mr. Flint, for his part, has filed a motion to compel (docket no 44), in which he asserts that the repeated requests have been necessary because he has not received, or Target has not in fact produced, the information or documents it claims to have provided him.

The court has reviewed the motions and all responses and exhibits thereto, and notes that, although Mr. Flint had tendered several specific requests, he is seeking information and documentation regarding one general issue relevant to his claims. Simply put, Mr. Flint wants to know whether the pills he was supplied contained any putatively inactive ingredient that is harmful to human health, or whether the pills may

have been adulterated in any way post-manufacture to post-distribution. To that end, he has tendered myriad discovery requests designed to elicit two distinct categories of information.

I.

First, Mr. Flint repeatedly has asked for all information and documents in Target's possession, custody or control regarding the specific ingredients contained in the Pyridium pills dispensed by Target and used to fill his initial prescription and two subsequent refills. In particular, Mr. Flint repeatedly has requested copies of all qualitative analysis or other laboratory testing results regarding certain specific pills. These pills were either included in the refill that allegedly caused Mr. Flint to have an allergic reaction or were from the same batch that was stored at Mr. Flint's local pharmacy and used to supply the refill.

Target has repeatedly stated i n pleadings filed with the court and served on Mr. Flint that the local store's pharmacy manager "sent the pills to Breckinridge for testing[, and t]he results of the test were supplied to the Plaintiff and they confirmed that the pills dispensed to the Plaintiff conformed with FDA standards." *See, e.g.*, Def's Mot. Summ. J. at 2 (docket no.48); *see also, e.g.*, Resp. No. 2 to Pl's First Set of Requests for Production of Documents and Answer No. 1 to Pl's First Set of Interrogatories. Target directs plaintiff's and the court's attention to a Quality Control Laboratory Test Report from Contract Pharmacal Corporation (the "CPC QC Report"), which it implies constitutes the qualitative analysis of those specific pills.

Target's representations to the court and to Mr. Flint cause the court concern. The statements imply, if not arguably state, that Target sent a representative

sample of the pills in its possession and used to fill Mr. Flint's prescription to Breckinridge for testing, that those pills were in fact tested, and that Mr. Flint was sent a copy of the test results pertaining to the specific pills that had been sent to Breckinridge by Target. The problem with these statements is that they seem to be misleading and appear to the court to be untrue. The only test results referenced by Target, either in its pleadings, or in open court, have been those contained in the CPC QC Report. That report, however, could not have been an analysis of the specific pills sent to Breckinridge by Target, as Target claims. Mr. Flint's prescription was not filled until December 2006, and he did not raise the issue of his alleged allergic reaction with Target, until after he had taken several of the pills. The CPC QC Report, however, pertains to an analysis of pills from a particular lot, which may indeed be the same lot of medication that was ultimately dispensed to Mr. Flint, but the analysis was performed in **September 2006**. Accordingly, the test results provided to Mr. Flint are not an analysis of the specific pills returned to Breckinridge by Target, and could not reasonably have been offered as such, but appear to be merely the results of a random lot sample performed pre-distribution by the manufacturer as part of its required FDA compliance efforts.

The court has accepted the representation of Target's counsel, as an officer of the court, that the CPC QC Report is the only laboratory analysis in Target's possession, custody, or control and the court has no reason to doubt the veracity of this statement. That does not, however, address what seem to be Target's misleading statements regarding what the CPC QC Report actually represents. Although given ample opportunity by the court during its recent hearing, at

which this issue, and Mr. Flint's concerns about it were discussed at some length, Target's representative did nothing to clarify the matter.[1] Target must do so now, **within ten days of the date of entry of this order.** Either Target sent specific pills to the manufacturer or distributor for testing and has the results of the qualitative analysis pertaining to those actual pills, or it does not. Either way, it cannot continue to represent to Mr. Flint and to the court, either directly or by implication, that the CPC QC Report constitutes qualitative analysis of the specific pills sent off for testing by Target, unless the court has misunderstood something.

In addition, Target shall review any other statements in its discovery responses or pleadings with the court regarding the contents of the other manufacturer's pills supplied to Mr. Flint. **Within ten days of the date of entry of this order,** Target shall clarify, supplement, or revise its discovery responses or pleadings as necessary, including supplying copies to Mr. Flint of any qualitative laboratory analysis that might be in Target's possession, custody, or control, regardless of whether that analysis pertains to be Qualitest or the Breckinridge pills.

II.

The second general area of legitimate inquiry about which Mr. Flint asserts he has not received complete information pertains to any quality control or quality assurance policies used by Target to confirm or otherwise ensure that medication supplied to Target not only complies with FDA regulations and manufacturing specifications, but also contains no inactive, but potentially harmful ingredients. For want of a better phrase, the court will refer to this as the "Quality Assurance Issue." Plaintiff has asked for this

information repeatedly, and in several different ways. Some of the information, specifically a copy of Target's "pharmacy Quality Program," may indeed have been sent to Mr. Flint. He has represented, however, that he did not receive a copy of the document. Accordingly, Target shall provide him with another one. The rest of Target's answers and responses regarding the Quality Assurance Issue are not as full, fair, and complete as the court would ordinarily expect from experienced counsel. Accordingly, the court will direct Target to review its discovery responses pertaining to Mr. Flint's Quality Assurance issue requests and **within ten days of the date of entry of this order** provide more specific information and documentation. Target shall limit its objections to those that are made in good faith and are narrowly drawn. The court agrees with Target that it is not required to provide Mr. Flint with responses that constitute legal conclusions, but many of its other objections and responses are not as specific as the discovery rules contemplate.

III.

Accordingly, for the reasons stated in this memorandum opinion, **IT IS HEREBY ORDERED** that Target's motion for a protective order is **DENIED** (docket no. 36), and plaintiff's motion to compel (docket no. 44) is **GRANTED IN PART**. Target shall amend, clarify, or supplements its responses to the discovery identified in plaintiff's motion to compel, and its motion for summary judgment, within the time frames specified and to the extent discussed in the foregoing opinion.

(s) James D. Moyer
United States Magistrate Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 3:07CV-600-R

Edward H. Flint, Plaintiff-Appellant,

v.

Target Corporation, Defendant-Appellee.

ORDERED - June 10, 2008

ORDER

On June 9, 2008, the court conducted a hearing in open court on several pending discovery motions in this matter. Present were counsel for the defendant Target Corporation and plaintiff, proceeding *pro se*. After hearing arguments from the parties, and being otherwise sufficiently advised,

IT IS HEREBY ORDERED that plaintiff's motion for discovery (DN 33) is **GRANTED** in part. Plaintiff has requested that Target supply him with twenty additional pills manufactured by Qualitest Pharmaceutical so that he can arrange for qualitative analysis and compare the results to those of the pills from Breckenridge Pharmaceutical. The court is not unmindful of the general limitations placed on Target regarding the dispensing of medication absent a prescription, but, pursuant to Rule 34 of the Federal Rules of Civil Procedure, a party is, under certain circumstances, entitled to the discovery of tangible things relevant to the claims at issue. Accordingly, the court will allow the discovery, subject to the following

limitations. If Target has any of the pills manufactured by Breckenridge Pharmaceutical in stock, it shall provide five such pills to a testing laboratory designated by the plaintiff. The pills shall be provided solely for the purposes of qualitative analysis, and the lab must agree to destroy or return to Target any unused pills. Plaintiff shall provide counsel for Target with the name of the drug laboratory of his choice and the appropriate contact person at that laboratory within seven days of the date of entry of this order. If Target does not have any of the Breckenridge Pharmaceutical pills in stock, it shall promptly notify plaintiff, so that he may timely serve on Breckenridge Pharmaceutical an appropriate subpoena pursuant to Rule 45 of the Federal Rules of Civil Procedure, if he so chooses, and before the discovery deadline of July 28, 2008.

IT IS FUTHER ORDERED that Target's motion to compel expert witness reports (DN 35) is **GRANTED.** Mr. Flint. shall supplement his expert reports as necessary to comply with Rule 26 of the Federal Rules of Civil Procedure within fourteen days of the date of entry of this order. Target shall then have forty-five days after Mr. Flint's disclosures to prepare and serve their own responsive expert reports, or make any amendments to existing reports that have already been served.

IT IS FURTHER ORDERED that plaintiff's motion to produce a 30 (b)(6) witness (DN 38) is **GRANTED**. Target shall designate its corporative representative within seven days of the date of entry of this order and contract plaintiff directly to agree upon a mutually convenient date and time for the taking of the deposition. Pursuant to the applicable rules of civil procedure and related case law, the plaintiff will need to travel to Target's headquarters in Minnesota to

depose the corporate representative, unless otherwise agreed to by counsel for Target. The court will, however, ask Target to consider whether bringing the corporate representative to Louisville, might be more cost effective and convenient for Target.

IT IS FURTHER ORDERED that plaintiff's motion for leave to file an amended complaint (DN 40) is **DENIED** at this time, because plaintiff has not tendered a proposed amended complaint. The court will, however, permit plaintiff an additional ten days from the date of entry of this order to renew his motion and attach a proposed amendment for the court's consideration.

The court has taken Target's motion for protective order (DN 36) and plaintiff's motion to compel (DN 44) under advisement and will issue rulings o n those motions by separate order.

(s) James D. Moyer
United States Magistrate Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 3:07CV-600-R

Edward H. Flint, Plaintiff-Appellant,

v.

Target Corporation, Defendant-Appellee.

DATED - January 9, 2008

SCHEDULING ORDER

A Telephonic scheduling conference was held January 4, 2008.

APPEARING BY PHONE

For the Plaintiff: Edward H. Flint, pro se

For the Defendant: Richard Paul Schiller

IT IS ORDERED:

(1) Disclosures pursuant to Fed.R.Civ.P. 26 (a)(1) shall be complete by March 17, 2008.

(2) No later than June 1, 2008 parties shall file all motions to amend pleadings.

(3) Identify experts in compliance with Fed.R.Civ.P.26(a)(2):

By plaintiff(s): **April 15, 2008**

By defendant(s): **June 1, 2008**

(4) No later than July 28, 2008 the parties shall complete all discovery. No discovery motion may be filed without having a joint telephonic conference with the Judge through his office (270-415-6430).

(5) No later than **September 1, 2008** counsel for the parties shall file all dispositive motions and any motions objecting the admissibility of expert wirness testimony under Fed.R,Evid. 702 and *Daubert v.*

Merrell Dow Pharmaceutical, Inc., 509 U.S. 579 (1993), *Kumbo Tire Co. v. Carmichael*, 526 U.S. 137 (1999). The party filing the last pleading in response to such motions shall notify the Court by Letter to his Paducah Chambers, with copies to opposing counsel, that the mortions are ripe for decision.

(6) The action is scheduled for a **telephonic final pretrial conference on February 2, 2009 at 10:30 a.m. EST.** The conference will be held telephonically, with the Court placing the call to counsel and plaintiff. Attorneys who will be trying the case shall be available with full settlement authority.

(7) At least 14 days before said conference counsel shall:

a) File a list of exhibits intended to be used at trial.

b) Produce for inspection of opposing counsel, marked for identifications, all exhibits and charts which will be used at trial.

c) Comply with Fed. R. Civ. Proc. 26(a)(3) as to witnesses and exhibits.

d) File any motions in limine **(any responses to motions in limine shall be filed within 7 days).**

e) File a pretrial brief containing a succinct statement of the facts of the case, the questions of facts and questions of law with citations.

f) Submit agreed proposed jury instructions. If the parties cannot agree, counsel shall submit proposed instructions with supporting authority. If the parties have the capability, the parties should submit a diskette containing the instructions in either WordPerfect or ASCII format.

g) Submit proposed jury vior dire questions. **The Court shall conduct vior dire.**

h) Designate portions of depositions to be used

at trial. Opposing counsel shall have 5 days thereafter to make additional designations.

In the absence of good cause shown, no witness shall be permitted to testify and no exhibit or testimony shall be admitted into evidence, except upon compliance with the conditions of this order.

(8) The actions is assigned for trial by jury on the **16th** day of **February, 2009**, at **9:00 a.m.** Counsel shall appear in chambers at 8:30 a.m.

(9) At the commencement of trial, counsel shall furnish to the official court reporter a list of pre-marked exhibits intended for use at the trial.

(s) Thomas B. Russell, Judge
United States District Court

411.340 When wholesaler, distributor or retailer to be held liable.

In any product liability action, if the manufacturer is identified and subject to the jurisdiction of the court, a wholesaler, distributor, or retailer who distributes or sells a product, upon his showing by a preponderance of the evidence that said product was sold by him in its original manufactured condition or package, or in the same condition such product was in when received by said wholesaler, distributor or retailer, shall not be liable to the plaintiff for damages arising solely from the distribution or sale of such product, unless such wholesaler, distributor or retailer, breached an express warranty or knew or should have known at the time of distribution or sale of such product that the product was in a defective condition, unreasonably dangerous to the user or consumer.

Effective: June 17, 1978
History: Created 1978 Ky. Acts ch. 91, sec. 6, effective June 17, 1978.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 3:07CV600-R

Edward H. Flint, Plaintiff-Appellant,
v.
Target Corporation, Defendant-Appellee.

On Appeal from the United States District Court for the Western District of Kentcky

FILED - August 27, 2008

PLAINTIFF'S MOTION FOR LEAVE TO FILE THE ATTACHED AMENDED COMPLAINT WHICH ALSO JOINS TWO (2) OTHER DEFENDANTS TO THE COMPLAINT AND IF THIS MOTION IS GRANTED—PLAINTIFF IS ASKING TO REMAND THE MOTION HE FILED ON JUNE 13, 2008 TO AMEND THE ORIGINAL COMPLAINT

Come the Plaintiff requesting from this Court, leave to amend the original complaint with the attached Amended Complaint that also joins two (2) other Defendants and if this court grants Plaintiff Motion for this motion then Plaintiff is also asking for leave to remand the Motion for leave to amend the complaint he filed on June 13, 2008
Therefore Plaintiff makes the following motion.

MOTION

Plaintiff moves this court, to grant Plaintiff leave to amend the original complaint with the

attached amended complaint which also joins two (2) other Defendants and if this Motion is granted then Plaintiff asks for leave to remand the Motion he filed on June 13, 2008 on which this court has not ruled. Plaintiff asks this court to sign the attached order

Respectfully submitted,

(s) Edward H. Flint, Pro, Se.
5800 Coach Gate Wynde #293
Louisville, KY 40207
502-896-1219
Pro, Se, Counsel for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 3:07CV600-R

Edward H. Flint, Plaintiff-Appellant,

v.

Target Corporation, Defendant-Appellee.

Breckenridge Pharmaceutical
1141 S. Rogers Circle, Suite 3
Boca Raton, FL 33487

Contract Pharmaceutical
135 Adams Avenue
Hauppauge NY 11788

On Appeal from the United States District Court for the Western District of Kentcky

FILED - August 27, 2008

AMENDED COMPLAINT JOINING TWO OTHER DEFENDANTS AND AMENDING THE ORIGINAL COMPLAINT

Comes the Plaintiff, Edward H. Flint Pro, Se amending his original complaint and joining two (2) other Defendants to the complaint:

1. Plaintiff is a resident of Louisville, Jefferson County, Kentucky, and resides therein at 5800 Coach Gate Wynde, Unit #293, Louisville, Kentucky, 40207:

2. On or about November 15, 2006 Plaintiff was operated on for prostate cancer, On November 16, 2006 plaintiff was given a prescription by his doctor, with 2 additional refills for a drug named Pyridium (Phenazopyridine). Plaintiff had the prescription filled later the same day at a Target Store located at 4174 Westport Road in Louisville, Kentucky and was directed to take three (3) pills per day. Plaintiff took the prescription as directed and with no problem.

3. On November 26, 3006 Plaintiff had the prescription refilled at the same store, again with no problems.

4. On December 6, 2006 plaintiff had the same prescription refilled again. The pills given him December 6, 2006 were a different shape and size/ The pills purchased on December caused the Plaintiff to break out with red spots (hives) that itched and caused his mouth to draw up inside with small bumps or ridges, causing his tongue to go numb and Plaintiff stopped tasting food, and developed other problems.

5. After taking 8 of the pills purchased on December 6, 2007 Plaintiff quit taking the pills, and called his doctor, who confirmed not taking them.

6. On December 11, 2006 the plaintiff went to the Target store where the pills was purchased and spoke with the pharmacist Mr. Rob Warford, who was the pharmacy manager, about his problems from the pills. Plaintiff was told by Mr. Warford the he was not given the wrong medicine, but the pills were from a different company. Mr Warford said all he could do for the Plaintiff was refund his cost of the pills. After Plaintiff complained further, Mr. Warford stated that the problem should go away in several days after Plaintiff stopped taking the pills. Rob the manager stated, Plaintiff should call Defendant's customer services if the problem didn't

start to clear up in a couple of days. Plaintiff asked for the phone number and Mr. Warford gave him a card with a customer service number.

7. Before calling Target's customer service, Plaintiff waited a few days, as Mr. Warford suggested, and after getting no relief, Plaintiff called the Target customer service phone number on December 20, 2006 and told the person answering the phone, what happen with the drug. The person took the complaint, asking questions about what transpired, and said they would put the complaint into the computer and send it to the right department, and someone from that department would call Plaintiff in four (4) days.

8. The Plaintiff waited and after not hearing from anyone at Target, called the customer service number again on January 10, 2007. The person answering Plaintiff's call this time told Plaintiff that his complaint from December 20, 2006 was in the computer, but she would put it in again. Plaintiff asked if there was someone else he could talk with about his problem. The person then gave Plaintiff a phone number saying it was the department who was responsible for this type of complaint.

9. Plaintiff called the number of the responsible department and a person by the name of Jenny answered the phone, Jenny was pleasant and very concerned. Jenny stated she would make sure the complaint was put in the computer again and said the person who would handle this complaint in the future was a person named Cindy. Jenny went to find Cindy at that time. Jenny could not find Cindy. Jenny stated she would have Cindy call the Plaintiff the next morning. The next morning when Cindy did not call Plaintiff, the Plaintiff called Cindy's number, her voice answered the phone, and the Plaintiff left word for her to call, stating it was

urgent. At 3:00 P.M. Cindy called the Plaintiff and was very rude. Plaintiff then asked to talk to Cindy's boss. She said he was in a meeting and she would give him the message and Plaintiff's phone number.

10. A Mr. Wright returned the call about two (2) hours later, stating he was Cindy's boss. The Plaintiff told Mr. Wright the problem he was having. Mr. Wright said he would have another person call. The next day a Mr. Paul Wirkkala called Plaintiff and stated he was now handling the case. Mr. Wirkkala told Plaintiff that Target could not do anything about this problem, Target was not responsible for the pills content, that they only sold the pills, that Plaintiff should contact the manufacturer of the pills for relief. Plaintiff communicated with Mr. Wirkkala about this matter, a number of times after that conversation, by both phone and letters, attempting to find the answer to who the manufacture was and what was in the pills that made him lose his taste and caused his injury.

11. Target refused to help Plaintiff find the solution to his injury and put the burden on the Plaintiff to find the solution. Plaintiff was told by Target that the manufacture was responsible, not Target.

12. Plaintiff alleges that he had expected to receive the same medication on December 6, 2006 as he received on November 16, 2006 and November 26, 2006 and Target failed to deliver the same medication.

13. Plaintiff alleges that Target failed to live by its own policy by not notifying Plaintiff that it changed suppliers, regarding the pills Plaintiff received pills on December 6, 2006. The pills and type of drug dispended to Plaintiff on December 6, 2006 were from a different manufacture, than the first two fills of pills he received on November 16, 2006 and November 26, 2006. Target has a written policy that states, when it dispenses sub-

sequent refills of prescriptions to quest that are manufactured by a different company than prior fills, Target notifies quests of the change by placing a green sticker on the bottle that states "This is the same medication you have been getting. Color, size or shape may appear different." Target did not place a green sticker on the bottle that contained the pills Plaintiff was given on December 6, 2006. The medication was not the same as in the first two fills.

14. Plaintiff alleges that with the pills Target dispensed to Plaintiff on December 6, 2007, Target also gave Plaintiff a "Patient Card," which stated the pills side effects could be Headaches and Belly Pain. The Patient Card never notified Plaintiff that the pills would cause hives. The dispened pills Plaintiff received on December 6, 2006 caused him to break out with hives over his body including his lips, tongue and mouth. The hives caused Plaintiff to lose his taste and other injuries to his body.

15. Plaintiff alleges that the thirty (30) pills he received on December 6, 2006 which contained one (1) active ingredient and fifteen (15) in-active ingredients, were defective. The pills composition were different in types of materials, in weight of pill and in size of pill than the pills were from the two fills Plaintiff had received in November, 2006.

16. Plaintiff contents that Defendants can not shrug off the blame for defective drugs and put the blame on the Plaintiff. It is clear that the system Target has set up on obtaining drugs has faults. Plaintiff did not and could not control the quality of drugs Target receives.

17. Plaintiff has learned that the pills that injured him was manufactured by Contract Pharmacal, who sold the pills to Breckenridge Pharmaceutical, who

in turn sold them to McKesson Corporation, who then sold them to Target.

18. Plaintiff alleges that over twenty-five percent of the pills sold to him on December 6, 2006 were out of the Manufacturer's Specification tolerance limit in weight; and these pills should have been rejected and never sold to any customers.

19. Plaintiff alleges that Target sent two pills from the batch that Plaintiff's pills came from, to Breckenridge to be tested and Defendants refuses to give Plaintiff the test results.

20. Plaintiff alleges that one or more Defendants were neglectful in their responsibility to Plaintiff.

21. Plaintiff alleges that one or more of the Defendants had no consideration for the health of customers.

22. Plaintiff alleges one or more Defendants did not test the complete finished pills after the pills were manufactured, thereby ignoring safety for consumers, before selling to Plaintiff.

23. Plaintiff alleges that one or more Defendants were more concerned about their own profits that about customer's health.

24. Plaintiff alleges that one or more of the Defendants had no control over the drugs before they were sold to Plaintiff.

25. Plaintiff alleges that one or more of the Defendants sold drugs to Plaintiff that they didn't know was safe and hereby injuring Plaintiff.

26. Plaintiff alleges that one or more of the Defendants at no time had control and never attempted to have control over the quality of the pills that was sold to Plaintiff. One or more of the Defendants never had an agreement with any supplier that the pills shipped

would be certified safe for human consumers. One or more Defendants had failed to establish a safety program regarding drugs consumed by humans purchased from them.

27. Plaintiff alleges that one or more of the Defendants has set up a supply system, starting at purchasing; all the way through to delivery to consumers, without any consideration for consumer's safety or any system that guarantees consumer's drug safety.

28. Plaintiff alleges that one or more of the Defendant's refused to hold their supplier responsible to identify the ingredient in the pill which caused plaintiff's problems.

29. Plaintiff alleges that one or more of the Defendants has refused to attempt to find a solution to clear up the Plaintiff's health problems, except to give Plaintiff at his request, some information about who manufactured the pills in question, and the active and in-actie material contained in the pills.

30. Plaintiff alleges that one or more of the Defendants had a Fiduciary Duty and Responsibility to consumers and failed to perform that Duty and Responsibility before selling the flawed pills that injured Plaintiff.

31. Plaintiff alleges one or more of the Defendants sold or dispended drugs to Plaintiff over which they had no control over at any time and their lack of control, injured Plaintiff.

32. Plaintiff alleges that one or more Defendants pushed Plaintiff's health to the side and refused to find the source of what caused Plaintiff's injury.

33. Plaintiff alleges that one or more Defendants had never attempted to have their suppliers certify the in-active materials in their prescriptions drugs at being safe for customers.

34. Plaintiff alleges that one or more Defendants failed to take Plaintiff injury and complaint serious.

35. Target failed to write up Plaintiff's injury and complaint as an incidence report, required by their own policies.

36. Plaintiff alleges that after he warned one or more of the Defendants they refused to take serious that other customers could be affected, by the pills, which harmed the Plaintiff.

37. Plaintiff alleges that one or more of the Defendants knew that when applying for the right to do business in Kentucky, they took on the responsibility to supply safe drugs to customers, they also knew they would have to take all steps to correct any harm done to their customers caused by their produces and failed to live to this responsibility.

38. Plaintiff alleges that one or more of the Defendants broke the trust that the State of Kentucky granted them by granting them the right to do business in Kentucky. Target when applying for the right to do business in Kentucky, knew that with the rights, there was a trust to sell safe products to consumers.

39. Plaintiff alleges that when one or more Defendants applied for and received the right to do business in the State of Kentucky; they took on the responsibility and duty to deliver safe drugs to all Kentucky citizens. If the burden of such Responsibility and Duty was too heavy for Defendants to carry, Defendants should not have applied for or accepted the tight to sell drugs in Kentucky.

40. Plaintiff alleges that one or more Defendants had a duty to customers to completely investigate serious health complaints.

41. Plaintiff alleges that Defendants sold Plaintiff pills that were not FDA approved and that FDA unapproved pills injured him.

42. Plaintiff alleges that the Defendants failed to apply to the FDA for approval to produce and sell the drugs that injured Plaintiff.

43. Plaintiff alleges that a trust exists between Doctor, Patient, Pharmacies, and that trust was breached when Plaintiff was sold flawed pills. One or more Defendants had the responsibility to assure the pills were safe.

44. Plaintiff alleges one or more of the Defendants failed to run test on all ingredients that were contained in the pills in question, attempting to find out if foreign materials or material overages of each ingredient was in the pills.

45. Plaintiff alleges that one or more of the Defendants attempted to diagnose Plaintiff's injury without seeing him and thereby was practicing medicine and ignoring Plaintiff's injury.

46. Plaintiff alleges that one or more of the Defendants discussed and put in writing to others, information about Plaintiff's health prior to his injury from the pills.

47. Plaintiff alleges that one or more of the Defendants has tampered with documents in this case to hid true discoveries, from Plaintiff.

48. Plaintiff alleges one or more of the Defendants has refused to demand that Breckenridge produce the test results, which Breckenridge stated they ran on the two pills, which had been sent to them by the Target store in Louisville. The two pills sent were from the same container as the pills that injured Plaintiff came from.

49. Plaintiff contends that Defendants may have broken other laws or regulations that have not come forward as of this time, that may before or during trial.

WHEREFORE, the Plaintiff demands the following relief

1. A trial by jury
2. If one or more of the Defendants is found guilty of any allegation in this complaint, or found guilty of neglect on any other issue that was due to Plaintiff, or broke any law or regulation that may come forward during trial, then Plaintiff demands Defendant be held accountable by the demands in the following paragraphs.
3. Defendants is ordered to use all efforts possible and to pay all cost necessary, to find the cause and cure for Plaintiff's health problems cause by the pills sold to Plaintiff on December 6, 2006.
4. Plaintiff is award financial damages as determined by a jury, both compensatory and punitive damages.
5. Plaintiff also demands that this court orders the Defendants to develop a policy that states, "all in-active materials in prescription drugs that they sell, are certified to contain no harmful materials" and those Defendants with retail outlets, hang a sign in their stores stating the policy.
6. For all cost of this suit.
7. For any other relief to which said plaintiff may appear entitled.

Respectfully submitted,

(s) Edward H. Flint, Pro, Se.
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Supreme Court, U.S.
FILED
JUL 29 2010
OFFICE OF THE CLERK

No. 10-3

In the Supreme Court of the United States

Edward H. Flint

Petitioner

v.

Target Corporation

Respondent

On Petition for a Writ of Certiorari to the Court of Appeals for the Sixth Court

Brief for the Respondent in Opposition

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ATTORNEYS FOR RESPONDENT TARGET CORPORATION

WESTERFIELD-BONTE CO., 619 W. KENTUCKY-P.O. BOX 3251, LOUISVILLE, KY

STATEMENT PURSUANT TO RULE 29.6

Pursuant to Supreme Court Rule 29.6 the undersigned Counsel for the Respondent, Target Corporation, certifies as follows:

Target Corporation has no parent companies, nor is it owned in any part by a publicly held corporation.

TABLE OF CONTENTS

Statement Pursuant to Rule 29.6 i

Table of Contents ii

Table of Cited Authorities iii

Table of Appendices iv

Questions Presented v

Statement of the Case 1

A. Facts 1

B. Nature of the Proceedings 2

Reasons for Denying the Writ 3

Summary Judgment in Favor of the Respondent Target Corporation was Appropriate and the Kentucky Middleman Statute is Constitutional 3

Conclusion 7

TABLE OF CITED AUTHORITIES

TABLE OF APPENDICES

QUESTIONS PRESENTED

1. Whether Summary Judgment was erroneously granted to the Respondent.

2. Whether Kentucky statute, K.R.S. § 411.340 is constitutional.

OPINIONS BELOW

The opinion of the Court of Appeals, Petitioner's Appendix, Pages A3-A8, (hereinafter "PA, ____") is unreported. The memorandum opinion of the District Court (Respondent's Appendix 1, Pages A1-A11, (hereinafter "RA, ____") is reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 21, 2007. The petition for rehearing en banc was denied on April 14, 2010. The petition for a writ of certiorari was filed on May 18, 2010, and placed on the docket on June 29, 2007. The jurisdiction of this court is invoked under 28 U.S.C. §1254 (1).

STATEMENT OF THE CASE

This case involves claims that the Petitioner filed against the Respondent, Target Corporation, alleging negligence and product liability in its sale of a prescription medication that was dispensed by Petitioner's local Target pharmacy. The United States District Court for the Western District of Kentucky granted summary judgment to Respondent, Target Corporation. RA, A1-A11. The United States Court of Appeals for the Sixth Circuit affirmed. PA, A3-A8. The Court of Appeals denied Petitioner's petition for a rehearing en banc. PA, A2.

Factually, this case arises, in part, out of the care and treatment Petitioner received from a non-party, Dr. David Benson, who performed prostate surgery on the Petitioner in November 2006. Following the surgery, Dr. Benson prescribed the drug, Pyridium (generic name: phenazopyridine), for the Petitioner. Pyridium is an analgesic used to relieve pain, burning and other discomfort caused by infection or irritation of the lower urinary tract. The Petitioner had the prescription filled

at the Target Pharmacy, located at 4174 Westport Road, Louisville, Kentucky. In total, Mr. Flint was dispensed three fills of Pyridium. The third fill of the medication was manufactured by a different manufacturer. With each prescription, Petitioner was provided patient education sheets, informing him of the general uses of the medication, the cautions associated with taking the medication, the side effects, and the pharmacy's and prescribing physician's information, and the name of the manufacturer. RA, A3; PA, A4.

Following the report of an alleged allergic reaction, Target pharmacist, Mr. Rob Warford, examined the prescription dispensed to Mr. Flint and confirmed that he received the correct medication, as prescribed by the Petitoner's physician, Dr. Benson. Mr. Warford also confirmed that the dosage instructions were correct in accordance with the physician prescription. There was no error in the filling of the prescription. Mr. Warford advised Mr. Flint to contact his physician, and he also referred him to Target's national customer service. He then provided Mr. Flint with the names and numbers of the manufacturers of the pills, and a list of the inactive ingredients in the pills that were dispensed in the third fill. RA, A3-A4. Mr. Flint subsequently instituted this lawsuit on October 10, 2007. PA, A5

ARGUMENT

SUMMARY JUDGMENT IN FAVOR OF THE RESPONDENT TARGET CORPORATION WAS APPROPRIATE AND THE KENTUCKY MIDDLEMAN STATUTE IS CONSTITUTIONAL

The Petitioner is seeking review by the Supreme Court of the United States on seven stated issues. They include: (1) & (2) the constitutionality of KRS § 411.340, also known as the Kentucky "middleman" statute, (3) the application of KRS § 411.340 to the dispensing of prescription drugs by a pharmacy, (4) interpretation of KRS § 411.340 as it relates to pharmacies, and (5) & (6) & (7) the Petitioner's due process rights as it relates to the District Court's ruling in favor of the Respondent, Target Corporation.

The Court of Appeals affirmed the District Court's findings that no genuine issues of material fact existed that could allow the Petitioner to establish that Respondent, as a pharmacy, breached the duty owed to him, and therefore Respondent could not be proven to be negligent. The Court of Appeals further stated that Kentucky's "middleman" statute, KRS § 411.340 applied to Respondent, Target, and shielded it from liability on Petitioner's product liability claim. The Court of Appeals' decision resulted in affirmation of the summary judgment decision in favor of Respondent, Target Corporation. And, that decision, applying the Kentucky state law on negligence and product liability as it relates to pharmacies in a negligence and product liability case, does not present a compelling reason for review by this Court. Sup. Ct. R. 10.

The United States District Court for the Western District of Kentucky and the United States Court of Appeals for the Sixth Circuit found that under Kentucky law, Respondent exercised the duty of care used by or-

dinary, skillful and prudent pharmacists under similar circumstances, and dispensed the correct medication to the Petitioner in accordance with the prescribing physician's instructions. RA, A1-A11; PA, A3-A8. The Court of Appeals, in its opinion stated:

> As the District Court found, all evidence presented indicates Target complied with that standard. Flint, 2009 WL 87469, at *3. Flint claims that the drugs he was given were not FDA-approved, but these statements are no more than bare allegations that do not suffice to defeat summary judgment. He also contends that Target breached it duty to him in the third fill by substituting a cheaper generic drug for another generic drug, but Target's actions are authorized by Kentucky statute. *See*, Ky.Rev.Stat.Ann. § 217.822. Flint further claims that Target had the duty to investigate and test any prescription medications it sold before dispensing them to customers, but there is no law to support this assertion. Summary judgment on Flint's negligence claim based on the element of breach was appropriate. PA, A6.

Additionally, the District Court and the Court of Appeals found that pharmacists in Kentucky are protected by the Kentucky "middleman" statute, Ky.Rev. Stat.Ann. § 411.340. PA, A6. See also, RA, A8-A9. Specifically:

> Kentucky law provides that retailers are not liable in product liability actions if: "(1) the manufacturer [is] identified and subject to the Court's jurisdiction, and (2)

> the product sold by the...retailer [was] unaltered from its original manufactured condition." Salisbury v. Purdue Pharma, L.P., 166 F.Supp.2d 546, 551 (E.D.Ky.2001). Exceptions to middleman protection exist if (1) ...the...retailer breached an express warranty, or (2) ...the ...retailer knew or should have known at the time of distribution or sale that the product was in a defective condition and unreasonably dangerous." Id. PA6.

Both the District Court and the Court of Appeals found that the two conditions were satisfied and that neither exception existed. Both courts rejected Petitioner's "unsupported allegation" that the middleman statute is unconstitutional. PA, A7.

The District Court and the Court of Appeals rejected the Petitioner's argument that it was error to not allow him to amend his Complaint to add greater detail against Respondent, finding that the added details "would not help [Petitioner] establish a genuine issue of material fact on the issues that entitle Target to summary judgment." PA, A8. Further, both courts held that the Petitioner did not properly preserve the argument regarding all pending non-dispositive motions for appeal, despite being given the opportunity to do so. PA, A8. The Court of Appeals found that:

> The District Court docket reveals that all non-dispositive motions were referred to a magistrate judge on May 20, 2008, who on September 20, 2008, ordered that "all pending non-dispositive motions are hereby administratively remanded without prejudice to the parties' right to request

> that they be returned to the court's active docket within 15 days after the entry of any order denying Target's request for summary judgment." Flint had been advised that, in order to have any of his remaining motions decided, he needed to take action before the district court, which he never did. PA, A8.

The Court of Appeals further held that Petitioner failed to appeal the magistrate's order or include any of the motions in his notice of appeal, thereby failing to preserve the issue for appeal. Finally, the Court noted in footnote number two that any further consideration of the August 28, 2008 motion to amend would be futile, as the one-year limitations period that applies to product liability and negligence claims in Kentucky had run before the motion was filed. PA, A8.

CONCLUSION

Therefore, it is respectfully submitted that the petition for writ of certiorari should be denied due to Petitioner's failure to show any compelling reason for review by this Court.

Respectfully submitted,

/s/ Richard P. Schiller

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APPENDIX

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 3:07CV-00600-R
No.09-5153

Edward H. Flint, Plaintiff-Appellant,

v.

Target Corporation, Defendant-Appellee.

FILED - January 13, 2009

MEMORANDUM OPINION

In this action, the plaintiff, Mr. Edward H. Flint, is suing Target Corporation *pro se*[1] because he experienced a negative physiological reaction after taking some medication dispensed by his local Target pharmacy. Mr. Flint believes that the negative reaction was directly caused by some pills dispensed by the Target pharmacy, and suspects the pills contained one or more harmful ingredients. In response, Target

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[1] *Pro se* is a Latin adjective "for self," and a short convenient phrase courts use to describe a person who represents himself in a legal proceeding without the aid of an attorney.

asserts that it correctly filled and dispensed Mr. Flint's prescription in accordance with his doctor's directions, and that there exists no evidence either that: (a) Mr. Flint's alleged reaction was caused by the pills in question, or (2) that the pills dispensed improperly contained harmful ingredients. Accordingly, Target has filed a motion for summary judgment of Mr. Flint's claims.

The Court has reviewed Target's motion, Mr. Flint's response thereto, and the evidence of record in this case. While the Court is not without sympathy to Mr. Flint's past physical discomfort, or his frustration over what he believes to be poor customer service taken to a potentially harmful extreme,[2] it observes that any recovery to be had would come from the manufacturer or distributor of the pills, not Target.

In Kentucky, there are two possible theories of recovery against pharmacists who dispense allegedly harmful medication: negligence and product liability. In this matter, there exists no genuine issue of material fact that would permit plaintiff to proceed to trial against Target on either claim. Accordingly, for the reasons stated herein, the Court will grant Target's motion for summary judgment and dismiss this action.

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[2]In making this observation, the Court does not mean to imply that it is this Court's official opinion that Target did, in fact, demonstrate poor customer service, much less that it is this Court's official opinion that Target made decisions that put the health or safety of its customers at risk. Rather, the Court is simply observing that Mr. Flint clearly, and earnestly, believes that Target did. As with much of life, there are the rare extremes of indisputable fact on one side and unfounded perception on the other, and then there is the large middle ground in between that consists of varying combinations of the two, neither of which can be dismissed without appropriate consideration and explanation when reaching a judgment.

I.

The facts about which the parties agree or, where disagreements exist, viewed in the light most favorable to Mr. Flint, are as follows. In November 2006, Mr. Flint's surgeon issued Mr. Flint a prescription of Pyridium (generic name: phenazopyridine) following surgery on Mr. Flint's prostate gland. Pyridium is an analgesic used to relieve symptoms of urinary tract discomfort. Mr. Flint took the prescription, which called for an initial supply and two refills, to his local Target pharmacy to be filled. The first supply of the drug was dispensed on November 16, 2006, in its generic form. The first refill, also in generic form, was dispensed by the same Target pharmacy on November 24, 2006. The second refill, also in generic form, but manufactured by a different company, was dispensed on December 6, 2006, again by the same Target pharmacy. Each time the prescription was dispensed, it was accompanied by a patient information sheet which listed several possible contrain dications, side effects (including headache, mild itching, and stomach cramps), and possible indicia of an allergic or negative physiological reaction (specifically blue or purple skin color, decreased urination, vomiting, yellow skin or eyes, rash, itching, swelling, dizziness, or trouble breathing).

On December 11, 2006, Mr. Flint reported to the pharmacy manager, Mr. Robert Wolford, that he had experienced what he believed to be an allergic reaction to the pills contained in the second refill—itchy hives and bumps inside his mouth, a numb tongue, and a loss of taste. Mr. Wolford examined the prescription and determined that there had been no error in the *filling* of the prescription. In other words, Mr. Wolford confirmed that the drug Pyridium had been dispensed to Mr.

Flint (albeit in its generic form, phenazopyridine) and the dosing instructions had been issued in accordance with Mr. Flint's surgeon's instructions. Mr. Wolford instructed Mr. Flint to stop taking the medication, however, and told him to call his surgeon. Mr. Wolford also gave Mr. Flint Target's national customer service number and the names of, and contact information regarding, the two companies who had manufactured the pills dispensed to Mr. Flint. Lastly, Mr. Wolford refunded Mr. Flint's money and gave Mr. Flint a list of the inactive ingredients in the pills sold by Breckinridge Pharmaceutical, the company that had manufactured the pills in the second refill, which contained the pills Mr. Flint was taking when he experienced a negative physiological reaction.

Thereafter, Mr. Flint attempted to resolve his concerns directly with Target's customer service department. The experience was not to Mr. Flint's liking. He perceived that Target's customer service agents were not being appropriately responsive to his concerns and were not being sufficiently helpful to his efforts to determine the cause of his reaction. Correctly or incorrectly, this led Mr. Flint to his now firmly-held belief that Target places greater emphasis on profit than customer health and, therefore, does not employ appropriate internal control measures sufficient to ensure that it only purchases quality pharmaceutical supplied from the manufacturers and distributors with whom it does business. He believes that there was some unidentified allergenic or otherwise harmful ingredient in the pills manufactured by Breckinridge Pharmaceutical that caused him to have an allergic reaction, not properly described as a risk on the patient information handouts provided to him when

his prescription was dispensed. Hence this lawsuit.

Because Mr. Flint is proceeding without an attorney, his causes of action are not presented in the customary fashion. That is to say, his specific legal claims are not identified and isolated from his general allegations. Rather, Mr. Flint's Complaint is presented in narrative form, as a series of complaints. This is not impermissible, or even atypical of Complaints filed *pro se*, but it nevertheless does pose some difficulty for the Court and for opposing counsel, who must attempt to liberally construe Mr. Flint's narrative and discern discrete, actionable claims amongst the general prose.

In its motion for summary judgment, Target has construed the Complaint as seeking relief under the theories of negligence and product liability. This comports with the Court's reading of the Complaint,[3] and its understanding of potential theories of recovery available to Mr. Flint under Kentucky law. Accordingly, the Court will now evaluate each cause of action, and determine whether Target's request for summary judgment should be granted or denied.

II.

It should be well known to all in the legal community by now, but because Mr. Flint is acting as his own counsel, it bears repeating that summary judgment as a matter of law is proper only where there exists no *genuine* issue of *material* fact. FED. R. CIV. P. 56(c)(emphasis added). In considering a motion

[3]Mr. Flint filed his initial Complaint in Jefferson Circuit Court on October 10, 2007, and it was removed to federal court on October 30. On June 16, 2008, after Target had moved for summary judgment, he filed a motion requesting leave to file an amended complaint. That motion has not been granted and, although it contains additional narrative, the tendered Amended Complaint does not contain additional causes of action, nor would it change this Court's substantive analysis.

for summary judgment, this court must construe the evidence and draw all reasonable inferences in favor of the non-moving party (in this case, Mr. Flint), *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986), and determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 91986).

The party bearing the burden of proof on a particular issue – regardless of whether he is the movant or non-movant – cannot rely on mere allegations or conclusory statements, however. *See Maki v. Laako*, 88 F.3d 361, 364 (1996). Whereas a *pro se* Complaint will be liberally construed and may be presented in narrative form, proof of a *pro se* plaintiff's allegations is a different matter. To defeat Target's motion for summary judgment, Mr. Flint must point to in the record, or proffer, actual evidence. *Id.* What's more, the evidence he proffers must fit within certain parameters. It must be "of an evidentiary quality [*i.e*, capable of being admitted at any trial of the matter] that demonstrates the existence of a genuine issue of material fact." *Bailey v. Floyd County Bd. of Educ.*, 106 F.3d 135, 145 (6th Cir. 1997)(emphasis and bracketed explanation added. To be of evidentiary quality, "[t]he proffered evidence need not be in admissible form, but its content must be admissible." *Id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)(emphasis in original omitted)).

With that general explanation in mind, the Court will turn to Mr. Flint's claims.

A. Negligence

Mr. Flint asserts that Target was negligent in its dispensing of his second refill. To successfully prosecute a claim of negligence, a plaintiff must establish the following four elements of that claim, that the Court will describe in terms particular to Mr. Flint's allegations:

1. That Target owed Mr. Flint a duty of care,
2. That Target breached that duty,
3. That Mr. Flint suffered injury, and
4. That the injury he allegedly suffered was directly or proximately caused by Target's breach of its duty of care.

See, e.g., Mullins v. Commonwealth Life Ins. Co., 839 S.W.2d 245, 247 (Ky. 1992). This, of course, begs the question: What is the specific duty of care owed by pharmacists to their customers? In Kentucky, the care owed is the duty of care used by ordinarily skillful and prudent pharmacists under similar circumstances – that is, to dispense the correct medication in accordance with the prescribing physician's instructions. *See Ohio County Drug Co. v. Howard*, 256 S.W. 705 (Ky. 1923)(older, but still good, common law). All of the evidence presented, even when construed in the light most favorable to Mr. Flint, indicates that Target did

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[4]The evidence proffered indicates that Dr. Kuhn, Mr. Flint's physician and expert witness, testified that he cannot be certain that phenazopyridine caused Mr. Flint's reaction. He further testified that he recommended that Mr. Flint consult with another specialists, Dr. Fowler, who might be able to isolate the cause of Mr. Flint's allergic reaction. There is no evidence that Mr. Flint ever sought Dr. Fowler's assistance, or consulted with any other specialist capable of opining with a reasonable degree of certainty about the cause of Mr. Flint's symptoms.

just that. Moreover, not even Mr. Flint disputes that Target dispensed phenazopyridine (Pyridium) pills in the correct dosage with the correct instructions for their use. Accordingly, putting aside the question of whether Mr. Flint proffered sufficient evidence that the physiological reaction he experienced was caused by the phenazopyridine pills he purchased at Target,[4] and not a reaction to a food or another type of medication he was taking, or even a reaction to another substance in his home or work environments, he cannot establish a key element of his negligence claim, namely that Target breached the duty of care it owed him when filling and re-filling his prescription. Target is therefore entitled to summary judgment of this claim.

B. Product Liability

The more complicated question is whether Mr. Flint has alleged a viable product liability claim against Target. Mr. Flint believes that the pills contained in his second refill, *i.e.* those manufactured by Breckinridge Pharamaceutical, may contain one or more inactive ingredients that are either inherently harmful or capable of causing allergic reactions such as the ones he allegedly experienced. In other words, he is asserting that Target sold him a defective product.

Generally speaking, anyone in the stream of commerce – from the manufacturer, to the distributor, to wholesaler, so the retailer – is *potentially* strictly liable for damages caused by a defective product. There are limits, however. As a matter of Kentucky statutory law, if the manufacturer of a defective product is identified and subject to the jurisdiction of the court, then the "middlemen" – namely those in the stream of commerce between the person who made the product and the ultimate consumer – such as distributors and

retailers – are not potentially liable for harm caused by the allegedly dangerous product *unless* the product was altered from its original manufactured condition or packaging, *or* the "middleman" either (a) breached an express warranty or (b) "knew or should have known at the time of distribution or sale of such product that the product was in a defective condition unreasonably dangerous to the user or consumer." *See* Ky. Rev. Stat. §411.340.

The first issue, of course is whether the manufacturer of the product has been identified. It has. Target identified Breckinridge Pharmaceutical as the manufacturer of the phenazopyridine dispensed to Mr. Flint in his second refill of his prescription, and Mr. Flint has neither disputed this in his pleadings, nor proffered evidence to the contrary. The next issue is whether Breckinridge is subject to the jurisdiction of this Court. It is, because it contracted to supply phenazopyridine to Target pharmacies in the Commonwealth. *See* Ky. Rev. Stat. 454.210; *see also Intera Corp. v. Henderson III*, 428 F.3d 605, 615 (6th Cir. 2005)(discussing the circumstances under which a company may be subject to the jurisdiction of this Court). The Court is thus left to ponder whether there is admissible evidence indicating that the pills sold to Mr. Flint had been altered from their original condition by Target, whether Mr. Flint alleged (in layman's terms) that Target breached an express warranty to him, or whether there is admissible evidence indicating Target knew the pills it supplied him were in a defective, unreasonably dangerous condition. If the Court answers "yes" to any of those three questions, Target may be liable to Mr. Flint.

With respect to the first question, this Court is not of the opinion that Kentucky courts would determine that a pharmacy's mere act of dividing and distributing drugs in doses is not sufficient to constitute an alteration of the drug's original condition or package. *See Smith v. Wyeth Inc.* 488 F. Supp, 2d 625, 629 (W.D. Ky. 2007)(Russell, J.). Something more, some active adulteration, is required. There is no allegation, much less any evidence, that Target deliberately adulterated the drugs from Breckenridge, or otherwise mis-handled them in a manner capable of causing harm to a consumer. Rather, Mr. Flint's allegation is that Target's fault stems from its decision to purchase the drugs from Breckenridge. That is a different issue altogether, and will be addressed next.

This Court finds, that, as a matter of law, Kentucky courts would agree with the majority of states which held that pharmacists are not liable for breach of either express or implied warranties with respect to the properties of particular drugs. *See id*, 488 F. Supp. 2d at 629 (internal citations omitted). Thus, even if Mr. Flint's allegations could be liberally construed to include a claim for a breach of an express warranty with respect to the properties of the medicines it dispenses,[5] that claim would fail.

As for the third and last question, there simply is no evidence that the pills supplied by Breckenridge

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[5]This is the Court's best reading of Mr. Flint's allegations. As noted previously, Mr. Flint believes that Target is not engaging in appropriate quality control in several areas ranging from its customer service, to its selection of suppliers, to its monitoring of the composition of the drugs it dispenses. One way of looking at this complaint (little "c") is that it constitutes a breach of some duty of allegations is that they state a claim for breach of warranty that any medicines sold would not contain any unidentified allergenic or otherwise harmful ingredients.

were in a defective, unreasonably dangerous condition. Rather, the evidence presented indicates that they fell within manufacturing specifications. There is no evidence to suggest that they had been altered, tampered with, or subjected to conditions that would have affected their chemical composition (*e.g.*, water, reactive chemicals), even from the testing facility to which Mr. Flint sent samples. Mr. Flint suspects that Breckenridge's generic form of Pyridium may have contained an inactive ingredient that was harmful to him in the sense that it triggered an uncomfortable, and lasting allergic reaction that has affected his quality of life. He may indeed be correct, but he has not responded to Target's request for summary judgment by providing the Court with the requisite evidence to prove that it did, however, and even if Mr. Flint could identify the putative allergen contained within the Breckenridge, that does not – without more specific proof – establish that the pills in question were defective or unreasonably dangerous. Target is therefore entitled to summary judgment in its favor with respect to Mr. Flint's second claim.

III.

In reaching its decision, the Court is mindful that, while Mr. Flint may not have a cognizable claim against Target, he nevertheless has experienced a physiological reaction that has caused him sufficient discomfort to make him initiate and vigorously maintain a lengthy lawsuit that has drained time, energy and resources. The Court is also mindful that several pending discovery motions recently were remanded pending the Court's adjudication of Target's Motion for Summary Judgment. Mr. Flint will therefore likely feel that this Court's determinations are premature,

and that he has been deprived of the opportunity to uncover sufficient evidence to make his case. None of the discovery sought in the remanded motions would have materially affected this Court's determination, however. Not all injuries are capable of redress by the courts, even if plaintiffs were permitted unlimited time and access to potential sources of proof. This is not always easy for a lay person to understand. Courts are supposed to right wrongs and they do, but only when and to the extent the law permits.

The Court will enter an order concurrently with this Memorandum Opinion that grants Target's Motion for Summary Judgment and dismisses Mr. Flint's claims.

/s/ Thomas B. Russell

Chief Judge, U.S. District Court